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A PRACTICAL APPLICATION OF THE "CHECKS AND BALANCES" OF THE CONSTITUTION.

No one has yet accused James Madison of having been an extremist, or described him as other than a most deliberate and thoughtful man, learned in the science of government, careful of and trained in expression and consecrated to the last breath of his life to the best interests of the great Union that he was so largely instrumental in creating. Said he (Scott's Journ. Const. Con., p. 372) "The Executives of the States are in general little more than cyphers, the legislatures omnipotent. If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some kind or other will be inevitable." James Wilson of Pennsylvania was just such a man. Said he (id. 102) "If the Legislative, Executive and Judiciary ought to be distinct and independent, the Executive ought to have an absolute negative. Without such a self-defense, the Legislature can at any moment sink it into nonexistence. He was for varying the proposition in such manner as to give the Executive and Judiciary jointly an absolute negative." There were others, like Alexander Hamilton, who entertained the same views. In its final Constitutional form, however, a two-thirds vote of the Legislative Department was made necessary to overturn the veto of the Executive. The Executive and Judicial Department were not allowed to coalesce in mutual protection, as was proposed by Mr. James Wilson and seconded by Mr. Madison (id. p. 398) but the latter was given the absolute negative as to legislation contrary to the Constitutional compact. So it works out that there is a limited Executive negative as to all legislation and an absolute Judicial negative as to unconstitutional legislation.

Students of the proceedings of the Constitutional Convention cannot but be forcefully impressed by the earnestness of purpose, rare vision and wholesome spirit of compromise displayed as to this feature. The fear of the eventual need of both these "checks" upon the Legislative Department has been frequently vindicated. The latest example is yet fresh in memory—the judicial denial of the right of Congress to impose a tax on the salaries of the Federal Judiciary. (Evans v. Gore, 16 U. S. S. C. Ad. Ops. 598, June 1st, 1920.) It is that to which attention would be drawn.

Since contemporaneously with the passage of the mischievous legislation (87 Cent. Law Journ. 402, Dec. 6, 1918), we quoted the views of all the members of the Convention in the effort to prove its unconstitutionality, supported by a rare unanimity of opinion to prevent just such an assault upon the Courts by the Legislative Department, there has been no editorial expression of appreciation of the recent decision of Evans v. Gore, supra, a decision which has lifted a weight of apprehension from the spirits of all lovers of the American Government. Such things as these should serve to emphasize the manifest fact that the Judiciary saved the Government from a legislative assault that would have shaken it to its foundation by destroying the financial independence of the Courts, and the confidence of a people in a possible subservient and dependent judiciary. It is also a case when the Executive failed, but the Judicial responded and where the Legislative Department proved recreant to the duty of exercising its own profound judgment.

Under the Act of February 24, 1919, Chap. 18, 40 Stat. at L. 1062, intended to fix federal taxes for the ensuing year, a levy was made upon the salaries of the Executive and the federal Judiciary. It was approved by the Executive, who could have vetoed it for any reason within his

judgment. It was negatived by the Judiciary because it was plainly in violation of the spirit of the Constitution, the only reason permitting it to act in the premises. Here is an example of the necessity for separate functioning by each—the Executive and Judicial Departments—that was predicted in the debates. The debates heretofore quoted and cited are conclusive of the mortal fear of eventual absolutism by Congress following the example of a great concourse of decadent nations lockstepping through time. Hence the unsuccessful proposal by Mr. James Wilson and Mr. Madison that the Executive and the Judiciary should combine in joint self-defense and the reason why there should be a closer co-operation and sympathy between these two departments.

It is within reason to say that the Legislative Department presented an example of irresponsibility feared by the Founders. Respectful hesitation and devout consideration and study by modern lawmakers would have been in order where so sacred a fundamental matter was at stake. Their individual judgment should have been exercised in this as in all matters. It was improper to enact the legislation with the expectation that it would be negatived by the Judiciary. It would have been most seemly to hearken to the voices of the Fathers that, though stilled in death, continue to echo down the corridors of time and live with eternal vigor and freshness in the hearts of all lovers of the spirit of the Founders reflected by the Constitution. But other motives seem to have prevailed. Impressed by the political inexpediency of omitting from taxation any subject or person, lest partiality be charged against them, the legislation was enacted under circumstances worthy of preservation. Said the Chairman of the Committees: (House Report No. 767, p. 29; 65th Cong. 2nd Sess.; Senate Rpt. No. 617, p. 6, 65th Cong., 3rd Sess. Cong. Rec. Vol. 56, p. 10, 370) "I wish to say that while there is considerable doubt as to the Constitutionality of taxing Federal Judges, or the President's salaries * * * we cannot settle it; we have not the power to settle it. No power in the world can settle it except the Supreme Court of the United States. Let us raise it, as we have done, and let it be tested." * * * I think really that every man who has a doubt about this can very well vote for it and take the advice of the gentleman from Pennsylvania, which was sound then and is sound now, that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it."

So the great American Congress, the makers of the laws and the representatives of a patriotic people, announced its utter irresponsibility or else deliberately avoided the issue and passed it on to another department of government, well knowing that both the Executive and the Judiciary were under ordinary circumstances disqualified by an obvious personal interest. It will not be overlooked that there are some as learned men in the Congress as there are in the Judiciary. Thereby they supplied a modern example of the wisdom of the Makers of the Constitution in providing "checks and balances" against irresponsibility as well as wickedness, and the former is the most to be dreaded.

No Statesman will be heard to excuse a vote in violation of his convictions because the Judiciary could be depended upon to do its duty, although unwillingly or intentionally a profound compliment was paid to the Judiciary, a commendation well earned and well deserved, but it is an unwholesome legislative state of mind that evades or ignores the primary duty of ascertaining the constitutionality as well as the merit of all proposed legislation.

Two modern practical lessons may be drawn from this incident. The one is the legislative disposition to shirk responsibility where it can be passed on to the Courts or the Executive and the other is the imperative necessity of assuring independent, fear-

less and learned Courts that can be trusted to measure up to a great and unexpected responsibility.

Said Luther Martin of Maryland (Id. 402): "It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature." Is the Legislative Department deliberately planning to destroy the confidence of the people in the Courts, is a question often asked.

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

WHAT IS MEANT BY "AMOUNT IN CONTROVERSY" TO JUSTIFY REMOVAL OF SUIT TO FEDERAL COURTS.—The matter in dispute must exceed in value $3,000 to justify a removal of a cause from the state to federal court. What is meant by "matter in dispute?" Is it the amount of the judgment prayed for or may it include the indirect value of the judgment or property connected with the matter in controversy and which is also affected by the judgment? The Supreme Court of the United States defined the rule in the case of Elgin v. Marshall, 106 U. S. 578. There the Court said:

"The language of the rule limits, by its own force, the required valuation to the matter in dispute in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by necessary implication, any estimate of value as to any matter not actually the subject of that litigation."

This definition, it seems, is not clear enough to avoid the frequent recurrence of the question in the federal courts. In the recent case of Wetsel v. Empire Gas & Fuel Co., 264 Fed. 865, the question arose over the removal of a suit over a gas lease. The lease was worth $500, the land $5,000. The title to the land would be affected by sustaining the lease and its value reduced. Was the land in dispute or only the lease? The Court decided, one justice dissenting, that only the lease was in dispute and therefore the cause could not be removed.

WHAT KIND OF INSURANCE MUST BE FURNISHED UNDER C. I. F. CONTRACTS?—When a buyer contracts to purchase and a vendor agrees to sell a lot of goods c. i. f., a well-known form of shipping contract, the purchaser pays a fixed price for which the seller furnishes the goods and pays the freight and insurance to the point of delivery, and all risks, while the goods are in transit, are for the account of the buyer.

In the recent case of Smith Company, Ltd., v. Moscahlades (App. Div., N. Y. Sup. Ct., May, 1920), the Court reversed a judgment for defendant for the reason that the jury had not been properly instructed on the question of the kind of insurance implied in such contract.

In this case the defendant contracted on October 4, 1916, to purchase c. i. f. 400 casks of codfish. Plaintiff placed the fish on board the S.S. Stephano, paid the freight and took out in the name of the buyer the usual contract of insurance against marine risks, which did not include war risk insurance. The ship was torpedoed and sunk by a German submarine. In the lower court the defendant recovered judgment under the instruction of the Court that under a c. i. f. contract the vendor is required "to take out such adequate insurance as the circumstances existing at the time required."

The appellate court, in reversing the judgment, held that the plaintiff's obligation was to procure such insurance as was then currently procured in the trade; that is to say, the kind of insurance which was then being generally taken out by shippers of fish sold by them on "c. i. f." terms.

The Court also held that the custom in this regard prevailing in Newfoundland, the domicile of the vendor, and not the custom prevailing in New York, the home of the buyer, should prevail, since under a c. i. f. contract the title passes to the buyer immediately upon delivery on board ship at place of shipment even though bill of lading is accompanied by draft which must be paid before goods are delivered. This position of the Court is well sustained by authority. Thames & Mersey Marine Ins. Co. v. United States, 237 U. S. 19; Mee v. McNider, 39 Hun, 345, aff'd 109 N. Y. 500; G. Groom, Lim., v. Barber, 1 K. B. 1915. 316; Arnold, Harberg & Co. v. Blythe, Green Jourdain & Co., 1916, 1 K. B. 495; Tregeles v. Sewell, 7 H. & N. 576; Ireland v. Livingston,

L. R., 5 H. L. 395; Biddell Bros. v. Celemens Horts Co., 1911, 1 K. B. 214, reversed 1 K. B. 934, but trial court aff'd H. L. 1912, App. Cases, 19.

The kind of insurance required under a c. i. f. contract must therefore be determined by the custom or usage prevailing at the point of shipment, and where the parties do not provide otherwise in their contract they are presumed to have known and to have contracted with respect to such general usage and custom. Robertson v. S. S. Company (139 N. Y. 416), Hostter v. Park (137 U. S. 30), Heywarth v. Miller Grain & Elevator Co. (174 Mo. 171), Silverstein v. Michau et al. (221 Fed. 55) and Ellicott on Contracts (vol. 2, sec. 1697) and 17 C. J. (p. 461, sec. 19-b).

THE CONSTRUCTION AND APPLICATION OF REVENUE ACTS.

One consequence of the heavy and increasing exactions of the tax-gatherer is a large increase in revenue cases, and as all these turn on the interpretation and application of purely statutory law, it is no little practical interest to note the general rules which the courts have employed in construing the taxing statutes.

As in the construction of contracts and all other statutes the cardinal rule is that fiscal statutes ought to be construed according to the plain and ordinary meaning of the words used, as it appears from the words themselves, and any incongruity therein does not authorize a court of law to adopt a strained and forced construction in order to avoid it. "It is better," said Kelly, C. B.,[1] "both for the statute and the subject, that the ordinary rules of construction should be applied and that the error or mistake should be ratified by the legislature."

If, however, allowing for the rule of construction referred to, the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.[2] No tax can be imposed on the subject without words in an act of Parliament clearly showing an intention to lay a burden on him. But when that intention is sufficiently shown it is vain to speculate on what would be the fairest and most equitable mode of levying that tax. The object of those framing a taxing act is to grant a revenue at all events, even though a possible nearer approximation to equality may be sacrificed in order more easily and certainly to raise that revenue, and the only safe rule is to look at the words of the act and see what is the intention expressed by those words.[3] If Parliament wishes to impose a tax upon the subject, it must do so in clear and distinct terms; if the matter remains in doubt, the subject is entitled to judgment.[4]

This adhesion to the letter of the law is maintained notwithstanding that the practice of the Inland Revenue authorities to the contrary may be alleged, or even proved. "The practice of the Inland Revenue authorities is not a matter that I can take into account. The meaning of the (Stamp) Act (1891) has to be ascertained from its words according to the plain meaning of its language, and when I find in the instrument the very words that satisfy the heading of the column in the schedule, I do not think I should be warranted in giving them any interpretation that would

(1) Foley v. Commissioners of Inland Revenue (1868), L. R. 3 Ex. 263.

(2) Partington v. Attorney-General (1869), L. R. 4 H. L. 100.

(3) Coltness Iron Co. v. Black (1881), 6 App. Case 315.

(4) Commissioners of Inland Revenue v. Angus (1889), 23 Q. B. D. 579.

prevent the rate of stamp duty charged from applying."[5] And Lord Halsbury, L. C.,[6] said: "The learned counsel have insisted that if the plain words of an Act of Parliament imposed a tax, no amount of omission to charge that tax, or to insist upon it, by the proper executive officer could control, or cut down or override, the force of the Act of Parliament itself. With that observation in itself I entirely agree. I do not think that any amount of use would be enough to contradict the proper efficiency of an Act of Parliament." Hence, although for more than thirty years no attempt had been made to enforce the Stamp Act in reference to receipts for counsel's fees, it was held[7] that when counsel places his initials or name after a fee of £2 or upwards on his brief or at the foot of a statement of fees the document is a voucher, and a voucher is an acknowledgment that money has been received, independent of the fact whether the word "received" is used or not, which constitutes a receipt within the meaning of § 101 of the Act of 1891, and is, therefore, liable to stamp duty.

Writing in a recent number of *The Accountant*, Mr. Albert Crewe, barrister at law, has collected some general rules particularly applicable to the Stamp Acts, and these, with due acknowledgment to that journal, we now give here:

1. Where an instrument is *prima facie* within the charge of the Stamp Act, it lies upon the party offering it in evidence to bring it within any exemption.[8]

2. A liberal interpretation should be given to words of exception confining the operation of the duty, especially to those intended to promote interests of trade and commerce.[9]

3. The same words might mean a very different thing, when put in to impose a tax, from what they would mean when exempting from a tax.[10]

4. If exemption from duty is claimed, the burden of proof lies upon the person claiming the benefit of the exemption.[11]

5. An exemption in a statute not relating to stamp duties is interpreted by relation to the scope and purposes of the statute rather than the generality of the words of the exemption.[12]

6. Headings of the various groups of the sections which are comprised under the respective headings of the Act of 1891 must not be discarded in considering the Act.[13]

7. Whether an instrument is duly stamped or not, or as to what stamp is required, depends generally on what appears upon the face of it to be its legal operation when first executed so as to be capable of that operation. A change in the law which takes place after an instrument has been executed but before it is presented for adjudication is immaterial.[14]

8. The duty being imposed on instruments and not on transactions, the fact that it may be possible to devise a means for carrying out the latter and avoiding the former is no ground for straining the meaning of the words of the Act in order to prevent such means of escaping liability to stamping.[15] But the Court will take every means of defeating an attempt by a private Act of Parliament to affect the rights of the Crown.[16]

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(5) Hamilton, J., in Mount Edgcumbe v. Inland Revenue Commissioners (1911), 2 K. B., at p. 31.

(6) Corporation of Dublin v. Trinity College (1903), 88 L. T., p. 305.

(7) General Council of the Bar v. Inland Revenue Commissioners (1907), 1 K. B. 462.

(8) Chanter v. Dickinson (1843), 12 L. J., C. P. 147.

(9) Warrington v. Furbor (1807), 8 East. 242.

(10) Rein v. Lane (1867), L. R., 2 Q. B. 144.

(11) Pinner v. Arnold (1835), 2 C. M. & R. 613.

(12) In re Royal Liver Friendly Society (1870), L. R., 5 Ex. 78.

(13) Mersey Docks, &c. v. Commissioners of Inland Revenue (1897), 1 Q. B. 786.

(14) Suffield v. Inland Revenue Commissioners (1908), 1 K. B. 865.

(15) Hankins v. Clutterbuck (1842), 2 Car. & Kir. 810.

(16) Great Northern, Piccadilly, and Brompton Railway v. Attorney-General (1909), A. C. 1.

MEANING OF "CASUAL" AS USED IN WORKMEN'S COMPENSATION ACTS.

Introductory.—Under the Workmen's Compensation Acts in some of our states no one whose employment is casual can recover compensation; while under the English act and the statutes in other of our states, one whose employment is of a casual nature comes within the statutes if it is also for the purpose of the employer's trade or business.

Hence, it has been declared that in ascertaining the meaning of the term "casual," the determinative point under the first mentioned acts is the contract of service, while under the latter it is the nature of the service rendered.[1]

It is not the purpose of this article to have to do with anything more than the meaning of the word "casual," as used in the Workmen's Compensation statutes in reference to employment. To attempt to do more would only serve to confuse the meaning of the word, as some of the cases have done, with the provisions of the exception noted, that recovery of compensation may be had by one whose employment is casual if such employment is also for the purpose of the employer's trade or business.

Definitions and General Consideration.—The dictionary definitions of the word "casual" suggest the idea, when applied to employment, of employment necessitated by chance circumstances. It is suggested that it is not used in contradistinction to "permanent or constant" employment.

Murray defines casual as "Depending on chance; depending on or produced by chance; occurring or coming at uncertain times; not to be calculated on; unsettled; coming without design or premeditation; casual laborer; one who does casual or occasional jobs."

Webster defines the word as, "Happening to come without being foreseen; coming without regularity."

The Century Dictionary defines it as follows: "Happening without design on the part of the agent, or as a mere coincidence; coming at uncertain times or without regularity; a laborer or artizan employed only irregularly."

In a California case it appeared that a painter was employed to apply two coats of paint to a certain building, the employer furnishing the material. The employment was not for any definite period of time, but the work would have taken about two weeks. During the first day the employe was accidentally injured. In passing on the question of the casual nature of the employment, the Court said: "It is noted that the ordinary signification of the word 'casual,' as shown by the lexicographers, is something which comes without regularity and is occasional and incidental; that its meaning may be more clearly understood by referring to its autonyms, which are 'regular,' 'systematic,' 'periodic' and 'certain.' Tested by this distinction, the contract of employment to paint the house was casual. It was a mere occasional and incidental contract, not constituting or connecting with any regular, systematic, periodic or certain business."[2]

"An employment that is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or to become necessary or desirable, is but a casual employment."[3]

The decided cases have adopted and followed these definitions.[4]

It has been said that a person who is employed one or more days in each week to do work which must be done, or which it is

(1) Thompson v. Twiss, 90 Conn. 444, 97 Atl. 328, L. R. A. 1916E 506.

(2) Blood v. Industrial Accident Board, 30 Cal. App. 274.

(3) Holmen Creamery Assn. v. Industrial Com'n., 167 Wis. 470, 167 N. W. 808.

(4) See all cases cited in this article.

known it will be advisable to do at these times, is not casually employed.[5]

Mr. Ruegg suggests that if one should employ a workman to work in his garden one day, or half a day, a week, subject to the former's control, such workman is not casually, but regularly employed at recurring ascertained times. And although, in this illustration, if the times are not strictly defined, but the contract is that the workman shall do the work required in the garden as it is required from time to time, no fresh contract or engagement being contemplated between the parties, though a discretion may be left in the workman to select the time or times of work, the employment is not casual, for though the work may be of a casual nature, the workman is under contract to do it as and when it arises.

In this view, much must depend upon the certainty of the work recurring at times which, though they cannot be fixed definitely, yet can be fixed generally, and the work when it arises having to be done by the same person.

If a workman is employed to repair a roof which has been damaged by a storm, his employment is of a casual nature, and it would make no difference if his contract were to require that he always make repairs necessitated by such an occurrence, because the periods when the work will be required cannot be ascertained even approximately, nor is there any certainty that it will ever be required.

It will be seen that the question depends upon the frequency and degree of certainty of the employment.

If one employs a man to carry his grip from the railway station to his home, the employment is casual. But if the contract is that the man is to meet a given train daily, and to carry the grip to the house daily, the employment ceases to be casual. However, the mere fact that one habitually calls for the same man to carry his grip whenever he returns from a journey does not change the casual nature of the employment; there being nothing fixed as to either frequency or degree of certainty, there being a new contract of employment each time upon his return.

From this consideration it appears that no fixed rule can be laid down for the determination of what is or is not casual employment. If the question depends upon the frequency and degree of certainty of the employment, the unanswerable question arises, How frequent and with what degree of certainty must the employment be to take it out of the rule as to casual employment? Each case, therefore, must be decided largely upon its own facts, but in reaching a decision in any particular instance, decided cases are of great value for the principles of law stated, and in showing how those principles are applied to a given state of facts.

Employment of Short Duration.—The defendant commenced the construction of a drive or runway from a viaduct to the second floor of its freight house, the latter also being in process of construction. The work was started by regular employes of defendant, but after a conference with the business agent of the Structural Ironworkers' Union, four union men were sent from union headquarters to complete the work; the claimant being one of the four. While so employed the claimant was injured, and the only defense to the claim was that the employment was casual. The evidence showed that this work was completed in three or four days; that defendant had in its regular employ ironworkers who started the work in question; that railroads now and then call in structural ironworkers from union headquarters to do work of this kind, but that claimant had never before been employed by defendant; that claimant was employed only for this particular job. It was held that the employment

(5) Ruegg, Employers' Liability & Workmen's Compensation (8th ed.) p. 276.

was casual, and that recovery could not be had.[6]

In this respect the Court declared: "The putting on of these union ironworkers for this temporary work only bears on the character of the contract of employment. The character of the work was fixed by the fact that it was a part of the railroad work. The character of the contract of employment, as to whether it was casual or not, was fixed by the contract of hiring —that is, the contract could have been of such a nature that claimant would have been a regular employe of the railroad as a structural ironworker, or it could have been of such a nature that he was only a casual employe for this particular job— and the question to be determined here is which kind of contract was, in fact, made."

Where, however, one was employed for an indefinite period at a fixed wage per day, on the erection of a constructural steel building, and was likely to be retained for some time, and as long as the work was unfinished, his employment was not casual; he being employed in the regular business of the employer.[7]

Employments of Short Duration Requiring Fresh Hiring.—The first case involving this question arising under the English Act was that of Hill v. Begg.[8]

In that case it appeared that a man who earned his living by doing odd jobs was employed by the occupier of a private house to clean windows. There was no agreement for either permanent or periodic employment, though the same man was usually employed, the custom being to send for him when the windows required cleaning. It was held that this employment was of a casual nature. Here there was no contract, express or implied, to do the work at recurring times. Each employment necessitated a new contract.

General Hiring for Short Periods of Regular Recurrence.—A charwoman was in the habit of working for a certain employer on Friday in every week and on Tuesday in alternate weeks. This had continued for a period of eighteen weeks prior to the happening of the injury in question. She went under a general understanding, without special request on each occasion. Held, that the employment was not casual, but of a regular nature, for definite periods perfectly well known to both employer and employe.[9]

The work of a man who was employed to look after the delivery of glass for a building under process of construction, was held not to be casual. The Court said: "In the instant case it is fair to suppose that the general contractor knew how much glass was to be delivered at the building. It became necessary in the interest of the business of the general contractor to have the delivery of the glass looked after and supervised, and claimant was employed for that purpose; that, as the glass was to be delivered as the work progressed on recurring occasions, it certainly cannot be said any of the necessary work to be done in furthering the job or enterprise was casual, for it was sure to occur and recur in the operation of the job. There was an element of certainty in the work recurring at times which, though they could not be fixed definitely, yet were fixed generally by the agreement to look after and assist in unloading the glass as it arrived from time to time."[10]

Fair Expectation of Recurrence of Work.—An employment is held not to be casual where one is employed to do a particular part of a service recurring somewhat regu-

(6) Chicago G. W. R. Co. v. Industrial Com'n., 284 Ill. 573, 120 N. E. 508, 18 N. C. C. A. 132.

(7) Scully v. Industrial Com'n., 284 Ill. 567,, Atl. 927.

(8) (1908) 2 K. B. 802, 77 L. J. K. B. 1074, 99 L. T. 104, 24 T. L. R. 711, 1 Butterworth's W. C. C. 320.

(9) Dewhurst v. Mather, (1908) 2 K. B. 754, 24 T. L. R. 819, 1 Butterworth's W. C. C. 328.

(10) Dyer v. James Black M. & C. Co., 192 Mich. 400, 158 N. W. 959.

larly, with the fair expectation of the continuance for a reasonable period.[11]

A man was employed by the road overseer of a county council to draw stones from a quarry. His wages were at a fixed rate per day, and he was to get work now and again when there would be work to do, but there was no objection to his working for someone else when he was not wanted badly by the county council. It was held that the man came within the Act and was entitled to compensation for an injury received.[12]

Assisting at One Job Only.—The employers, who were engaged in the transfer and storage business, operated a large number of wagons, and employed many drivers and helpers, and extra men were picked up when occasion required. The claimant had been working for a long time as a carpenter, but on this occasion, one of the employers, knowing that he was idle, told him that he might make a few dollars by aiding them. The job was termed "a pick-up job," and was not completed that day. He was paid for the day's work, but returned next morning and helped to complete the job. He was then told to go with the teamster to help move a washing machine, and while moving the machine his hand was injured. In holding that the employment was casual the Court said: "He was employed for no definite time. He did not intend to become a regular employe and the plaintiffs in error did not intend him to be a regular employe. He understood that the employment was a pick-up job, and they so understood it. He was not on the regular pay roll, though the clerk who worked on the pay roll testified that if he had known that claimant was coming the next day he would have put his name on the pay roll in order to get the money from the bank, as Saturday was pay day. When that day's work was done there was no contract of hire, express or implied, oral or written, between the plaintiffs in error and claimant, and he would no longer have been in their service, unless he had been again hired for another day or a longer time."[13]

Waiter Serving at One Banquet.—A waiter employed by a caterer to serve at a banquet was injured while preparing for the banquet. He had never been employed prior to that time by that caterer. The custom of the catering business was that such banquets were served by waiters secured for each particular occasion. In declaring that such employment was but casual, the Massachusetts Supreme Court said: "It would be difficult to conceive of employment more nearly casual in every respect than was that of the employe in the case at bar. The engagement was for a single day and for one occasion only. The relation between the waiter and the caterer had no connection of any sort with any events in the past. Each was entirely free to make other arrangements for the future, untrammeled by any express or implied expectations of future employment. The employment was not periodic and regular. It was in the course of the regular business of the employer. But under our act that is an immaterial circumstance, in view of the other fact that the employment was but casual."[14]

Extra Help Employed When Needed.—A young man was employed from time to time to work as helper in a butcher shop. From September 19 to Thanksgiving Day, 1916, he worked every evening after school and all day Saturday. From Thanksgiving Day until the Christmas vacation he did not work there at all. From January 1 up to the time of the injury on June 4, 1917, he worked at various times, Saturdays mostly, though not every Saturday; sometimes two days in the week. When-

(11) Sabella v. Brazileiro, 86 N. J. L. 505, 91 Atl. 1032, 87 N. J. L. 710, 94 Atl. 1103.

(12) O'Donnell v. Clare County Council, 6 Butterworth's W. C. C. 457, 47 Ir. L. T. 41.

(13) Thede Bros. v. Industrial Com'n., 285 Ill. 483, 121 N. E. 172.

(14) In re Gaynor, 217 Mass. 86, 4 N. C. C. A. 502.

ever the employer needed extra help or when some regular employe was off he was called in. It was held that the employment was not casual.[15]

It may be assumed that the Court in this case considered that the rather long period of time during which this young man was employed for short periods at more or less regular intervals, took the employment out of the casual kind, and fixed the general nature of the same with sufficient degree of certainty.

Regular Employe Assisting at Unusual Work.—A corporation, engaged in the manufacture of automobiles, employed the deceased as a mechanic at its warehouse, at a fixed salary per week, and at the same rate for overtime. Races were scheduled for Saturday and Sunday for the purpose of permitting different companies to promote the names of their cars, and get them before the public. Each company entering cars in the races had assigned a space near the starting point, called a "pit," and two men were in each pit for the purpose of handing out extra parts, gasoline, etc. On the day of the accident deceased, who was assisting in the pit, got out of the pit and was standing on a fence beside the track. One of his employer's cars stopped near the pit, and he ran out towards it and was struck and killed by another car. Overruling the contention that the employment of deceased was casual, the Court said: "He was a regular employe of appellant, and his work was not materially different at the time of the accident from that which he ordinarily did. He was a mechanic, kept cars in proper condition, and was working in the regular course of such employment at the time of the injury; therefore, his employment was not casual."[16]

Work Mere Incident of Regular Employment.—The claimant was a laborer in the employ of a sewer builder, his duties consisting chiefly of opening trenches from houses to street. He had been so employed for about five months. At the time in question, however, he was riding in an automobile, in which there was also material, from one job to another, and was injured when a street car collided with the automobile. In holding that the employment was not casual, the Court said: "De Vito's employment was not casual, as argued by the plaintiff in error. His employment cannot be said to have been uncertain, haphazard, irregular or incidental as distinguished from stated or regular. The word 'casual,' in the statute, has reference to the contract of service, and not to the particular item of work being done at the time of the injury. The evidence clearly discloses that De Vito had been regularly employed by plaintiff in error for five months at his business or occupation of digging or excavating sewers, etc. Within the meaning of the statute he was engaged at that very work or occupation when he was injured, although at the particular time of his injury he was only doing an act or work that was a mere incident of his employment."[17]

Employe on Trial.—A few days before the accident which resulted in his death, deceased applied to defendant for employment as chauffeur, representing himself as competent. He was told to come to work the following Monday morning when he would be given a trial, and if he proved satisfactory he would be given steady employment for about four weeks at a stated salary. During his first day of work, and while accompanied by an old employe who was to pass on his competency, deceased was accidentally killed. The old employe testified that deceased was competent, and that he would so have reported to defendant. It was held that the employment was not casual; that it was of no consequence

(15) Jordan v. Weinman, 167 Wis. 474, 167 N. W. 810.

(16) Frint Motorcar Co. v. Industrial Com'n., Wis. 1919, 170 N. W. 285.

17) Scully v. Industrial Com'n., 284 Ill. 567, 120 N. E. 492.

that deceased's name had not as yet been placed on defendant's pay roll.[18]

Burden of Proof.—While the burden of proof is on the claimant to show employment and injury, it rests on the employer to prove that the employment was casual.[19]

C. P. BERRY.

St. Louis, Mo.

(18) Marshall Field & Co. v. Industrial Com'n., 285 Ill. 333, 120 N. E. 773.

(19) Chicago G. W. R. Co. v. Industrial Com'n., 284 Ill. 573, 120 N. E. 508, 18 N. C. C. A. 132.

STATUTE OF FRAUDS—GROWING CROPS.

SLINGLUFF v. FRANKLIN DAVIS NURSERIES, Inc.

Court of Appeals of Maryland. March 17, 1920.

110 Atl. 523.

Where nursery company conveyed land on which there were young apple and pear trees intended for sale to its customers, reserving by parol agreement the right to remove trees within specified time, grantee's refusal to permit removal within the specified time, and expression of intention to dispose of the property by lease, entitled company to injunction restraining interference with removal of trees; it having no adequate remedy at law, and its equitable interest in trees being entitled to protection by injunction.

URNER, J. For the purposes of the demurrer to the bill of complaint in this case, it is admitted that the plaintiff company, which is engaged in the business of growing and selling fruit trees, sold and conveyed to the defendant a tract of land on which were young apple and pear trees intended for sale to the plaintiff's customers; that by special agreement the right to remove the trees was reserved to the plaintiff, provided the removal should be completed not later than the spring of 1919; that on February 17, 1919, the defendant wrote the plaintiff a letter to the effect that, if the trees could not be removed by April 1, an arrangement might be made to have them remain on the land another year, to which the plaintiff replied, by letter dated February 19, that the trees would all be removed prior to April 1; that on February 27 the plaintiff was notified by the defendant not to remove any more of the trees, and thereafter continued to prohibit their removal until the filing of the bill and the issuance of the preliminary injunction on March 8; that the defendant wrote the plaintiff on March 6, stating that he would lease the land to some other party if the plaintiff did not indicate a desire to lease it by March 10, and that the prompt and careful transplanting of the trees was necessary to render them available for the market. The bill alleges that the defendant's interference with the removal of the trees would cause irreparable injury, unless restrained by injunction, and that the plaintiff has no adequate remedy at law.

The demurrer to the bill is based solely on the theory that there is an adequate legal remedy for the injury of which the bill complains. This theory was not sustained by the court below, and the demurrer was overruled by an order which is the occasion of the pending appeal.

That the reservation of the trees, though made by parol, was valid and effective, is definitely settled by the case of Willard v. Higdon, 123 Md. 447, 91 Atl. 577, Ann. Cas. 1916C, 339. The effect of the reservation was to retain the ownership of the trees in the plaintiff, and to secure it the right to remove them from the land within a specified time. The defendant's action, as described in the bill, violated the plaintiff's alleged right, while it was being exercised in accordance with the agreement by which it was reserved. Accompanying the defendant's refusal to permit the trees to be taken from the land was the statement of his intention to dispose of the property by lease. Under such circumstances it could not be properly held that an action at law would have afforded the plaintiff an adequate remedy. The specific trees in question were its property, and were required to be promptly and skillfully removed for the purposes of its business. A suit for damages or an action of replevin would not have satisfied such an interest and exigency. The contemplated lease of the property, if made to one without notice that the trees were reserved to the plaintiff, would have seriously impeded the enforcement of his claim in a court of law by any form of action. Besides, the right which the plaintiff asserts is of an equitable nature, the legal title to the soil and the trees being in the defendant, and a court of equity has ample authority to protect such

a right by injunction. Carmine v. Bowen, 104 Md. 207, 64 Atl. 932, 9 Ann. Cas. 1135.

It is not necessary to dispose of the case on the basis of the statutory provision that an injunction shall not be refused on the mere ground that the applicant has an adequate remedy in damages, unless the opposite party shall show that he has property from which the damages can be made or shall give bond to secure their payment Code, art. 16, § 84.

Decree affirmed, with costs, and cause remanded.

NOTE—*Reservation of Growing Crops From Sale.*—In Grabon v. McCracken, Okla., 102 Pac. 84, 23 L. R. A. (N. S.) 1218, it was held in the case of a deed to certain described land, that it was competent for seller to show that it was agreed at the time of the sale of a matured crop of corn that he might remove same afterwards, this right entering into the consideration of the sale.

There are many cases cited in support of this proposition, among others that of Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592, wherein it was said: "It is a rule of the common law that growing crops are personal property, but pass by conveyance as appurtenant to the land, unless severed by reservation or exception, and this rule has not been altered by statute of frauds and perjuries. A party may show by parol that the growing crops were reserved on a sale of the land, although there is no exception in the deed."

This view is said to be upheld in Aull Sav. Bank v. Aull, 80 Mo. 199; Champion v. Munday, 85 Ky. 31, 2 S. W. 546; Richardson v. Traver, 112 U. S. 423, and also cases from Maine, New Hampshire, Alabama, Indiana and Massachusetts.

But several other courts deny this rule. As for example, when it may be applied independently of the principle that the terms of a writing may not be contradicted by parol. There is general recognition of the rule that *fructus industriales* are chattels though unsevered from the soil. It will be sufficient to cite as to this Marshall v. Fergusson, 23 Cal. 65; Garth v. Caldwell, 72 Mo. 622; Dayton v. Dakin, 103 Mich. 65, 61 N. W. 349.

In Kammrath v. Kidd, 89 Minn. 380, 95 N. W. 213, 99 Am. St. Rep. 603, it was ruled that as a deed takes effect only on delivery and not from its date, the rule of merger of antecedent parol understandings applies, as *eo instanti* the deed's delivery everything of a parol nature must needs be antecedent. A great abundance of cases are cited to this in a note to the case above as reported in 99 Am. St. Reports at page 605.

In Stewart v. McArthur, 77 Iowa 162, 41 N. W. 774, the rule of parol evidence not being admissible to contradict a writing was enforced where plaintiff claimed reservation of growing crops from a deed to land, and it was held that the proof to show a mistake should be established by clear and satisfactory evidence, which was held not to have been met in that case.

In Gibbons v. Dillingham, 10 Ark. 950, Am. Dec. 233, it was held that the deed containing no express reservation of growing crops, they passed with the deed.

As showing how this rule works an elaborate note is appended to the case of Crews v. Pendleton, 1 Leigh 297, as reported in 19 Am. Dec. at page 752, where by great abundance of authority it is held that in an execution sale of land all crops then growing pass to the purchaser.

But independently of this rule, showing that the claimant other than the holder of the title must act before any intervening rights may accrue, the case of Smith v. Johnson, 1 Penrose and Watts (Pa.) 471, 21 Am. Dec. 404, holds broadly that growing grain does not pass by a conveyance of the land. Gibson, C. J., discusses the cases quite thoroughly and concludes by saying that "Whatever may be the law in England or our Sister States, it is clearly settled by usage and judicial decision here, that, except by devise, the crop does not pass as parcel of land. The practice of reserving the crop has, I believe, been universal, insomuch that when the reservation is not expressly declared, it is nevertheless a tacit condition of the contract."

Chief Justice Gibson has ever been considered one of the luminous judges of this country.

In a preemption case it has been held that one preemptor failing to purchase during the time allowed him by law loses both the right to the crop which he has planted as well as to the land, where he is dispossessed by one who afterwards purchases from the government. Razor v. Qualls, 1 Blackf. (Ind.) 286, 30 Am. Dec. 658. The question of nursery trees being or not *fructus industriales* is not touched upon.

The question seems unsolved and opinion seems fairly equally divided.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE NORTH DAKOTA BAR ASSOCIATION MEETING.

The Bar Association of North Dakota held its annual meeting at Jamestown, N. D., on August 19 and 20.

Hon. Peter W. Meldrim, of Savannah, Georgia, delivered the annual address, his subject being "The Trial of Aaron Burr." Wide and intelligent research enabled the speaker to so marshal the facts as to make them speak with irresistible logic and eloquence in appeal to lawyers and laymen for a revision of the popular judgment on one of the most gifted of Americans; in appeal for justice at the hands of the lawyers of today for one of the great lawyers of a hundred years ago. It was not merely a justification of Burr's acquittal on his great trial for treason. It was a revelation of truth, in the light of which the courage and genius of that unfortunate American

is made to outshine those of some of his contemporaries, not a few of whom stooped to criminal practices in the efforts to accomplish his everlasting disgrace. As a contribution to the literature of the law and of the early political life of the country it is declared that Judge Meldrim's address should rank as a classic.

A notable paper was contributed by the Honorable William Renwick Riddell, of the Supreme Court of Ontario. "What of Canada" was the title, and very many Americans in high places might profit by the reading of it. The League of Nations furnishes the keynote of the address, and in words which reveal the genuine affection of true Canadians for their brothers in "the States," we are told that it was with incredulity that Canadians received information that one of our chief objections to the great peace covenant was that, under it, in the council of nations Canada would have representation equal with that of the United States. No defense of the League of Nations is offered, nor is it argued that its failure should leave the world "without hope." That Canada is no more a dependency of Great Britain than we are is made plain, and is somewhat emphasized by reference to the fact that Canada is now to send her own ambassador to Washington. Under such conditions, it is asked why the United States would more willingly sit down in council on equal terms with the "black republic of Hayti," and some ten or twelve other nations mentioned, than with Canada. A better understanding by some American statesmen of what Canada really is appears worth while. Judge Riddell's address is an appeal for such better understanding to the end that these two nations of English speaking people may the more wisely administer their joint and solemn trust—the mighty destiny of this continent.

The organization of the bar of the state as a body corporate and politic and under the name of "The Law Society of North Dakota" was proposed by the report of a special committee. A tentative draft of a bill by which such organization might be brought about was submitted and discussed at some length. The committee is to make further report before the Association takes definite action on the question.

Hon. Charles A. Pollock, of Fargo, was elected president and John E. Greene, of Minot, secretary-treasurer.

JOHN E. GREENE.

Minot, N. D.

CORRESPONDENCE.

SITUS OF INCOMES FOR TAXATION.

Editor, Central Law Journal:

In your number for June 16, 1920, I was interested to observe editorial comment upon the case of Maguire v. Trefry. You advocate the application of the rule of Union Refrigerator Transit Company v. Kentucky to intangible property. But you also intimate that in your opinion the proposition concerning the nature of the income tax contended for by the appellant in Shaffer v. Carter is more nearly correct than the contention made by the plaintiff in the Maguire case. That is, I understand you to suggest that an income (as distinguished from capital) should be taxed at the domicile of the recipient.

Now the object of extending the Union Transit Company rule is to avoid duplicate taxation. In substance at least this end will not be obtained if you have one situs with respect to the taxation of capital and another situs with respect to the taxation of income. As you will see from the copy of our brief in the Maguire case, which I enclose, Pennsylvania levied a property or capital tax upon the securities composing the trust fund, and Massachusetts topped this tax off with an income tax assessed against the beneficiary. Unquestionably the practical result of this procedure was duplicate taxation. Yet it seems to accord with the propositions which you advance in your editorial comment.

In the Maguire decision the United States Supreme Court has said in substance that with respect at least to the income of intangible property it will not hold a state taxing statute unconstitutional because that statute is based upon the fiction that mobilia personam sequuntur. It always has been believed that the United States Constitution left the states considerable latitude within which they could if they saw fit accomplish substantial injustice by means of taxation. So while, of course, I should have preferred to see the Maguire case otherwise decided, I am by no means prepared to say that it does more than carry out a recognized principle. We always expected to lose the case, having been advised by the late John G. Johnson that in his opinion the Supreme Court would hold that an equitable interest in personal property, tangible or intangible, could constitutionally be taxed to the owner of that interest at his domicile, despite the fact that the

property was permanently located in a foreign jurisdiction.

But this does not necessarily mean that the Shaffer case is wrong. The situation has not yet arisen in which Pennsylvania seeks to levy an income tax upon interest paid by one of her residents to a resident of Massachusetts who holds the Pennsylvania man's promissory note. If and when this case does arise it will come into head-on collision with State Tax on Foreign-held Bonds and I should suppose that the old decision would have vitality enough to carry the day. In pure logic it may be hard to differentiate Shaffer v. Carter from such a case as State Tax on Foreign-held Bonds. But in actual substance and commonsense I see a great difference between a payment of interest money due to a foreign holder of a promissory note and payment of income derived from a tangible flow of oil arising within the taxing jurisdiction.

Yours very truly,

JOHN M. MAGUIRE.

Boston, Mass.

We are interested in the comment of counsel for plaintiff in the case of Maguire v. Trefry, recently decided by the Supreme Court, on our discussion of the principles involved in this case in 90 Cent. L. J. 439. The situs of intangible property for purposes of taxation is one of the most perplexing of all the problems of the law. Our disposition to accept the decision in the Trefry case was not the result of any logical analysis of the situs of intangible property, but simply a practical solution in line with the great weight of authority. While the Supreme Court has finally released choses in possession from the ridiculous maxim, mobilia personam sequuntur, and has declared that tangible personal property has its situs, not with the owner, but at the place of its actual location, we do not think, for practical reasons, the Court will ever make such a declaration in respect of intangible property. Credits have their situs at the domicile of the creditor and not at the domicile of the debtor. This has been the rule ever since the case of Murray v. Charleston, 96 U. S. 440. But where the credit or chose in action is evidenced by some indicia of ownership, as a note or bond, the Supreme Court has held that such evidences of indebtedness may be taxed at the place where they are deposited. New Orleans v. Stempel, 175 U. S. 322; Bristol v. Washington County, 177 U. S. 145.

What we have sought to do was to create some unanimity of professional opinion to induce the Supreme Court to adopt some uniform rule for determining the situs of incomes for purposes of taxation so as to avoid the injustice so often inflicted on the holders of intangible securities under the uncertain and illogical rules for determining the situs of such property for taxation.

We do not see that the old case of State Tax on Foreign Held Bonds, 15 Wall 300, offers an insuperable barrier to an income tax by Pennsylvania on the income of bonds held in that state by a trustee, as in the Trefry case. That case held that a corporation could not be required to deduct 5 per cent of the interest due on bonds in the hands of a non-resident creditor and pay same to the state treasurer, since that would amount to taxing bonds in another state. In the Trefry case the bonds are actually located in Philadelphia, and under the rule in the Stempel case, supra, the state can tax the interest and profits accruing from a fund located in the state. It is only an ordinary debt which can have no other situs than that of the creditor, according to Justice Brewer in the Stempel case (p. 314). That position, it seems to us, should be taken with respect to income taxation. It is a simple debt due to the creditor, and under repeated decisions of the Supreme Court, cannot be taxed except at the creditor's domicile.—EDITOR.

HUMOR OF THE LAW.

"Our imports and exports are keeping up, I see."

"Yes, and our deports are going to be good, too."—*Boston Transcript.*

"What is alimony, ma?"

"Alimony, my child, is something that is considered by many women as an improvement on a husband."—*Boston Transcript.*

"It would be interesting, would it not," asked the suave salesman, "if we were to strike oil in our well tomorrow?"

"Yes," replied J. Fuller Gloom. "If I were present I am sure I should enjoy seeing the air practically filled with stockholders blown out of the hole by the uprushing oil."

"Do you believe in deporting 'Reds' in Government ships?"

"Certainly not," replied the square-jawed citizen.

"What's your plan?"

"Make 'em swim."—*Birmingham Age-Herald.*

Presence of mind is a great thing. A boy came running to his father with the news that a man had fallen through the open coal hole.

"Clap the cover on quick and call the policeman," said his father. "We must arrest him for trying to steal our coal or he will be suing us for damages."—*Boston Transcript.*

A Virginia lad unexpectedly distinguished himself in a recent history examination.

"How and when," was the question put to him, "was slavery introduced into America?" His reply was:

"To the early Virginia colony no woman had come over; but the planters wanted wives to help them with the work. In the year 1619 the London Company sent over a shipload of girls. The planters gladly married them, and slavery was introduced into America."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Adoption** — Common Law.—No right of adoption existed at common law.—Holmes v. Curl, Iowa, 178 N. W. 406.

2. **Alteration of Instruments**—Invalidation.—A promissory note is not invalidated because of the unauthorized alteration thereof by a stranger thereto.—Coulson v. Stevens, Miss., 85 So. 83.

3.——Materiality.—Material alterations in a promissory note constitute a sufficient plea in bar to an action on the note, and full opportunity should be given the defendant to avail himself of such defense.—McCranie v. Cason, Fla., 85 So. 160.

4. **Assignments**—Garnishment. — A creditor cannot assign a part of fund due him without the debtor's consent, although he can assign the whole, but such question can be raised only by the debtor or holder of the fund, and not by plaintiff in action against garnishee.—Taylor v. Dollins, Mo., 222 S. W. 1040.

5. **Assignments for Benefit of Creditors** — Preference.—A creditor cannot avoid the effect of a trust agreement for the completion of the debtor's contract by trustees on the ground that a creditor who signed subsequently expressly reserved his preference rights to certain funds of the debtor, especially where the former creditor had a similar preference right which he enforced, though he did not expressly reserve it.—Boyle v. Rider, Md., 110 Atl. 524.

6. **Attorney and Client** — Contingent Fee.—Contracts by attorneys at law for contingent fees are generally upheld by the courts, but a contract by an attorney at law to assist in the prosecution of a criminal case for a contingent fee, dependent upon the conviction of the accused, is contrary to public policy.—Baca v. Padilla, N. M., 190 Pac. 730.

7. **Bankruptcy**—False Statement.—The making by bankrupt of a written statement of the financial condition of the firm of which he was a member to a bank, for the expressed purpose of obtaining a loan of money to the firm, and upon which such loan was obtained, from which statement he omitted items of indebtedness to his wife and sister aggregating $10,000, shown on the books of the firm, held to constitute the obtaining of money on credit by means of a materially false statement, which under Bankruptcy Act, § 14b (3), Comp. St. § 9598, warranted refusal of his discharge.—Perlmutter v. Hudspeth, U. S. C. C. A., 246 Fed. 957.

8. **Bills and Notes**—Estoppel.—Payment of negotiable paper, and a plea thereof, is the most solemn recognition of execution, delivery, and consideration, and one so pleading is, in the absence of fraud and duress, estopped to deny the admission.—Greenlees v. Chezik, Colo., 190 Pac. 667.

9.——Negotiable Instrument.—Written orders to an individual requesting her to pay a lumber company $325 for materials, etc., held not bills of exchange or other negotiable instruments within uniform negotiable instruments law being governed by common principles.—Ex Parte E. C. Payne Lumber Co., Ala., 85 So. 9.

10. **Brokers**—Good Faith.—Agents employed by a landowner to sell or exchange properties for an agreed commission owe their principal the utmost good faith and loyalty while their agency exists, and, if they violate their duty and obligation to him by concealing information as to the prices of property, and by misrepresentation and fraud obtain a profit to themselves in excess of the agreed commission, they forfeit their right to the commission, and render themselves liable for the damages suffered by the principal through their bad faith and breach of duty.—Schlesener v. Mott, Kans., 190 Pac. 745.

11. **Carriers of Goods**—Commerce Act.—Representatives of interstate carrier cannot, by conversations, letters, and negotiations extending beyond time limited for suit by contract pursuant to the Interstate Commerce Act, estop the carrier to assert and invoke the limitation against the shipper.—Schroyer v. Chicago, R. I. & G. Ry. Co., Texas, 222 S. W. 1095.

12.——Special Interest.—Any one having a special interest in the goods or the shipment may maintain an action against a carrier for damage in transit.—Bennett v. Dickinson, Kans., 190 Pac. 757.

13. **Carriers of Live Stock** — Verbal Agreement.—No verbal agreement for cattle cars for shipment in interstate commerce can be relied on under the Carmack Amendment, which requires a written contract, nor can a preliminary oral agreement for a future interstate shipment.—Underwood v. Hines, Mo., 222 S. W. 1037.

14. **Carriers of Passengers**—Res Ipsa Loquitur.—In a res ipsa loquitur case against a street railway for injuries to a passenger when the street car collided with a team of horses, a charge of general negligence is proper.—Yates v. United Railways of St. Louis, Mo., 222 S. W. 1034.

15. **Charities**—Trust Fund.—A trust fund is for a public, charitable use, where its purpose is to aid any deserving person suffering from cancer to secure treatment for that disease in its early and probably curable stages.—Treadwell v. Beebe, Kans., 190 Pac. 769.

16. **Commerce**—Telegram.—The transmission of intelligence by wire, being commerce, is governed by the act of Congress regulating the same, where the route of such transmission lies in more than one state, though the point of origin and the point of destination are within the same state.—Western Union Telegraph Co. v. Bushnell, Ind., 128 N. E. 49.

17. **Constitutional Law**—Due Process of Law.—Rights of property cannot be taken away or interfered with without due process of law. But there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority.—Leis v. Cleveland Ry. Co., Ohio, 128 N. E. 73.

18. **Contracts**—Unilateral Contract. — Where an employer offered to give 5 per cent bonus to men in its employ making four months' straight time, and an employe accepted the offer by working four months, he was entitled to the bonus; the employer's unilateral contract having become supported by consideration

through the acceptance.—Henderson Land & Lumber Co. v. Barber, Ala., 85 So. 35.

19. **Corporations**—Bill of Sale.—A bill of sale of corporate stock, given to secure a debt, is a mortgage, regardless of the wording of the contract.—Lyons v. Yielding, Ala., 85 So. 21.

20.——Defunct Corporation.—A judgment rendered against a defunct corporation, in an action brought after the forfeiture of its charter by reason of failure to pay license and franchise taxes, is void.—California Nat. Supply Co. v. Flack, Cal., 190 Pac. 634.

21.——Foreign Corporation.—A single transaction whereby a foreign corporation undertook to find a purchaser for property located in the state does not amount to a doing of business in the state so as to avoid the contract for compensation.—Chas. E. Walters Co. v. Hahn, S. Dak., 178 N. W. 448.

22.——Foreign Corporation.—In order to obtain jurisdiction over a foreign corporation by service upon an agent within this state, the authority of the agent and the business in which he is engaged must be of such a character that it may be said that in his person the corporation is present in the state. An agent authorized to take orders, make collections, make adjustments, and dispose of property of the corporation within the state is such an agent.—Nienhauser v. Robertson Paper Co., Minn., 178 N. W. 504.

23.——Foreign Corporation.—The home of a corporation is in the state of its creation, and generally, when it engages in business in another state, those entering into contracts with knowledge of the limitations imposed by its charter do so subject thereto.—City of Jamestown v. Pennsylvania Gas Co., U. S. D. C., 268 Fed. 1009.

24.——Stockholder.—Upon an increase of the capital stock of a corporation, a stockholder is entitled to maintain his proportionate influence, and for that reason must be given an opportunity to purchase a proportionate amount of the new shares before they can be offered to outsiders.—Hammer v. Cash, Wis., 178 N. W. 465.

25. **Covenants**—Running With Land.—A covenant in a deed conveying a right of way to a railroad company, whereby the company was to maintain a private farm crossing, runs with the land.—Pittsburgh, C., C. & St. L. Ry. Co. v. Kearns, Ind., 128 N. E. 42.

26. **Criminal Law**—Aiding and Abetting. — Though mere presence at the commission of a felony does not make one an aider or abettor thereof, if he was present by a preconcert with guilty parties he is an aider and an abettor, though he does not encourage the commission of the crime by word or act.—State v. Farris, Iowa, 178 N. W. 361.

27.——Extra Judicial Confession. — Extrajudicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.—Martin v. United States, U. S. C. C. A., 264 Fed. 950.

28.——Procuring Another.—Criminal guilt can be fixed where one procures another to do a criminal act.—Merritt v. United States, U. S. C. C. A., 264 Fed. 871.

29.——Withdrawal of Plea.—The withdrawal of a plea to an indictment is not a matter of right with the person indicted, but is within the sound discretion of the trial judge to permit or deny.—State v. Gunn, La., 85 So. 45.

30. **Damages**—Mitigation.—Whatever may be the landlord's obligation, in case the tenant abandons the premises, to mitigate damages by re-entering and re-letting, the landlord is under no obligation to mitigate damages in behalf of those liable for the rent by evicting the tenant and reletting the premises.—H. H. Camp Co. v. Pabst Brewing Co., Wis., 178 N. W. 474.

31. **Deeds**—Lex Loci Sitae.—So far as real estate or immovable property is concerned, the laws of the state where it is situated furnish the rules which govern its descent, alienation, and transfer, the construction, validity, and effect of conveyances thereof, and the capacity of the parties to such contracts or conveyances, as well as their rights under the same.—Connor v. Elliot, Fla., 85 So. 164.

32. **Divorce**—Abandonment.—Where husband and wife separated by agreement, and thereafter the husband contributed nothing to the wife's support, even during an illness following an operation, the wife is entitled to divorce for the husband's willful and intentional neglect and refusal to support her.—Stevenson v. Stevenson, Utah, 190 Pac. 776.

33.——Domicile.—A husband who went to a city in the commonwealth with intention to remain if he found conditions favorable, but without definite and fixed intention to remain and become a resident of the city at all events, did not acquire a domicile in the commonwealth.—Field v. Field, Mass., 128 N. E. 9.

34. **Dower**—Divorce.—Under Rev. St. 1909, § 359, if a woman is divorced from her husband through the fault or misconduct of the husband, the judgment of divorce does not of itself divest her of her dower.—Arnold v. Arnold, Mo., 222 S. W. 996.

35. **Easements**—License.—Owner of building who for a fixed consideration granted the right to use wall for advertising purposes for a term of one year could not revoke such right prior to expiration of the year, regardless of whether the contract be treated as a lease, a license, or a simple contract to use the wall space; the right to use the wall being not merely permissive, but a right in the nature of an easement.—Thos. Cusack Co. v. Myers, Iowa, 178 N. W. 401.

36.——Way Appurtenant.—Whether a right of way created by indenture was for the benefit solely of the occupants of dwelling houses to be erected, to end when houses were demolished, or was an absolute grant of a way appurtenant to land on which houses stand, depends on intention of parties, as found in words used to express meaning, as applied to subject-matter. —Nash v. Elliot Street Garage Co., Mass., 128 N. E. 10.

37. **Equity**—Benefit from Wrong.—No person shall be allowed to reap the benefits arising from his own wrongful acts.—Taff v. Smith, S. C., 103 S. E. 551.

38.——Unliquidated Damages.—A demand for unliquidated damages for breach of contract is not cognizable in chancery.—Rosenberg v. Century-Plainfield Tire Co., et al., N. J., 110 Atl. 516.

39. **Estoppel**—Abandonment.—"Waiver" is the intentional abandonment of a known right, not a mere trick to catch one napping.—McKee v. McGhee, S. C., 103 S. E. 508.

40.——After Acquired Title.—Where a life tenant conveyed land by warranty deed, after-acquired title which descended on the life tenant upon death of the remainderman passed under the deed by operation of law.—Sorrell v. Bradshaw, Mo., 222 S. W. 1024.

41.——Waiver.—A waiver, to operate as an estoppel, must arise from conduct evidencing both knowledge and an intention to waive the right in question, and the party against whom an estoppel is sought must by his conduct have caused the party who invokes the estoppel to have acted to his prejudice.—Cary v. Northwestern Mut. Life Ins. Co., Va., 103 S. E. 580.

42. **Exchange of Property** — Inadequacy of Consideration.—Gross inadequacy of consideration, while not itself sufficient to justify rescission of a contract for the exchange of land, is evidence of fraud.—Rhodes v. Uhl, Iowa, 178 N. W. 394.

43. **Frauds, Statute of**—Oral Agreement.—An oral agreement for arbitration and oral award to settle controversy as to natural course of surface water did not involve the question of title or interest in real estate, and is not void under the statute of frauds.—Maxson v. Cress, Iowa, 178 N. W. 379.

44. **Fraudulent Conveyances**—Stock in Trade. —Civ. Code 1912, § 2434, which undertakes to regulate the sale of an entire stock in trade, refers to the sale of merchandise by a merchant, and does not apply to a sale of mules

owned by one engaged in logging. Summerton Live Stock Co. v. Cleveland Mfg. Co., S. C., 103 S. E. 516.

45. **Homicide**—Dying Declaration.—To render dying declarations admissible, the judge must be fully satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope of recovery. This absence of all hope of recovery, and appreciation by the deceased of his speedy and inevitable death is a preliminary foundation that must always be laid to make such declarations admissible.—Lowman v. State, Fla., 85 So. 166.

46.——Peaceable Character.—Where defendant charged with assault with intent to kill offered testimony as to his previous peaceable character, it is competent for the state to prove defendant had been convicted of assault, etc.—State v. Wicker, Mo., 222 S. W. 1014.

47. **Husband and Wife**—Community Property.—All property acquired by either spouse during coverture is presumed to be community property, and the burden of proof rests upon the party who asserts it is separate property to show such fact by a preponderance of evidence.—Clifford v. Lake, Idaho, 190 Pac. 714.

48. **Injunction**—Trade Union.—Even if members of a trade union have threatened and intimidated employes of plaintiff, injunction cannot be issued against the union, but only against the guilty members if they are parties to the action.—Diamond Block Coal Co. v. United Mine Workers of America, Ky., 222 S. W. 1079.

49. **Insurance**—Construction of Contract.—Though punctuation marks may be considered as an aid to the interpretation of an insurance policy, they will not control, nor change a meaning which may be plainly gathered from the words and their arrangement.—Zantow v. Old Line Acc. Ins. Co., Neb., 178 N. W. 507.

50.——Premium.—There being nothing in the statute or in the articles of incorporation forbidding a township mutual fire insurance company to extend credit to an applicant for insurance, or to waive prepayment of the premium, the officer of such company, having authority to accept insurance and issue policies, may, upon the receipt of an application for immediate insurance agree to extend credit for the payment of the premium or waive prepayment of the same.—Wieland v. St. Louis County Farmers' Mut. Fire Ins. Co., Minn., 178 N. W. 499.

51. **Judgment**—Contradiction of.—Extrinsic evidence—evidence dehors the judgment roll—is admissible to contradict the officer's return of service and the recital of service in the judgment.—Pettis v. Johnston, Okla., 190 Pac. 681.

52. **Landlord and Tenant**—Invitee.—The duty of a landlord to his tenant and the tenant's invitee was that of due care to keep a piazza used in common by tenants, and in the control of the landlord, in such condition as it was in, or purported to be in, at the time of the letting.—Kirby v. Tirrell, Mass., 128 N. E. 28.

53.——Relief from Forfeiture.—Equity relieves tenants against a forfeiture where there has been a breach of covenant, caused by accident or mistake, to perform some collateral duty, such as to repair or insure, and where the lessor by compensation or otherwise can be placed as if the breach had not occurred.—Finkovitch v. Cline, Mass., 128 N. E. 12.

54. **Larceny**—Intent.—An authorized agent of the consignee to receive and receipt for the goods is guilty of larceny of the goods from an interstate carrier, if he took possession of them without giving a receipt therefor, and with intent at the time he took possession to steal.—Nudelman v. United States, U. S. C. C. A., 264 Fed. 942.

55. **Libel and Slander**—Presence of Officer.—An action will lie for a slanderous charge of crime made in the presence of a police officer.—Zinkfein v. W. T. Grant Co., Mass., 128 N. E. 25.

56. **Malicious Prosecution**—Probable Cause.—The existence of "probable cause," which is the existence of such facts and circumstances as would excite in a reasonable mind the belief that the person charged was guilty of crime, is a complete defense, though the person is innocent.—F. W. Woolworth v. Connors, Tenn., 222 S. W. 1053.

57. **Mandamus**—Adequate Remedy.—The writ of mandamus will not be issued in any case where there is a plain and adequate remedy in the ordinary course of law, and where the duty or right sought to be enforced by such writ is not clear and indisputable.—Champlin v. Carter, Okla., 190 Pac. 679.

58.——Prima Facie Title.—Public office may not be adjudicated on application for mandamus, but in such a proceeding sufficient investigation may be made to ascertain whether the plaintiff has a prima facie title to the office.—Independent School Dist. of Manning, Carroll County v. Miller; Miller v. Hinz, Iowa, 178 N. W. 323.

59. **Marriage**—Removing Impediment.—Where a marriage between a man and woman contracted in good faith is void because of an impediment thereto, they become husband and wife if after the removal of the impediment they continue to occupy that relation in fact, although a new marriage agreement was not made by them after the removal of the impediment.—Sims v. Sims, Miss., 85 So. 73.

60. **Master and Servant**—Accepting Benefits.—An agreement between a railway employe and a relief department that acceptance of benefits would preclude recovery for injuries resulting from the company's negligence is not contrary to public policy, for, as the employe was given an option to refuse the benefits, the contract amounted to no more than settlement.—Pittsburg, C., C. St. L. Ry. Co. v. Carmody, Ky., 222 S. W. 1070.

61.——Estoppel.—That employe, after having been told by employers that it was likely that they would have to cut his salary about 50 per cent, interviewed competitors of employers, did not preclude him, after his discharge because of refusal to execute bond and sign contract at decreased compensation, from recovering compensation due him on the ground that he had been disloyal.—Hopkins v. Conley & Hussey, Iowa, 178 N. W.

62.——Knowledge of Danger.—Where both master and servant have equal knowledge of the danger incurred by the servant in obeying an order, the jury may assume the servant is free from negligence in doing it.—Gilbert v. Hilliard, Mo., 222 S. W. 1027.

63.——Respondeat Superior.—Where a bondsman, employed by a company conducting a burglar alarm and night watch service, after having obtained a signed explanation from a watchman employed by a third party of his reasons for not "ringing in" on an electrical signal box, made a taunting remark to the watchman precipitating a quarrel resulting in the shooting of the watchman by the roundsman, the company was not liable; the tort being one not in the scope of the roundsman's employment.—Turner v. American District Telegraph and Messenger Co., Conn., 110 Atl. 540.

64.——Wrongful Discharge.—An employe, tendering his written resignation, which is accepted by the employer, cannot recover for wrongful discharge prior to termination of contract, though the resignation was at the employer's request and was made merely for the sake of appearances.—Martin v. Gauld Co., Ore., 190 Pac. 717.

65. **Mines and Minerals**—Surface Ownership.—Title and possession of the surface of land prima facie carries ownership and possession of all beneath the surface, a presumption which as to minerals, may be overthrown by proof as a matter of defense that the mineral is part of a vein apexing in land or a claim belonging to some one else.—Arizona Commercial Mining Co. v. Iron Cap Copper Co., Mass., 128 N. E. 4.

66. **Mortgages**—Discharge.—Where one who has purchased land subject to, and with knowledge of, certain incumbrances against it, the amount of which is in effect deducted from the purchase price, pays the amount due upon and procures an assignment of one of such mort-

gages, the mortgage is discharged.—Bull v. Smith, N. Dak., 178 N. W. 426.

67. **Municipal Corporations**—Condition Precedent.—As a condition precedent to right of recovery for injuries through slipping on ice accumulated on a sidewalk by reason of a defective rainspout, it was incumbent on plaintiff to show that written notice of injury seasonably was given the owners, as required by St. 1913, c. 324.—Coghlan v. White, Mass., 128 N. E. 33.

68. **Negligence** — Lex Loci. — In an action brought in Indiana for injuries in Ohio, the laws of Ohio control, except in matters of procedure. —Cleveland, C., C. & St. L. Ry. Co. v. Wold, Ind., 128 N. E. 38.

69.——Prima Facie Case.—Where circus seats let to a photographer taking a group picture collapsed, causing injury to one of the group, proof of the injury alone was sufficient to make out a prima facie case against the photographer.—Larrabee v. Des Moines Tent and Awning Co., Iowa, 178 N. W. 373.

70. **Payment**—Burden of Proof.—Where defendant asserted payment of a duebill given plaintiff, defendant had the burden of proof on that issue.—Smith v. J. M. Taylor & Co., Ark., 222 S. W. 1062.

71. **Physicians and Surgeons**—Regulation of Business.—The General Assembly has the right to reasonably regulate business and occupations, especially that of physicians and surgeons, and the State Medical Act (Gen. Codes, § 1269 et seq.), requiring a license to practice medicine, is clearly within the police power as a regulation of public health.—Nesmith v. State, Ohio, 128 N. E. 57.

72. **Principal and Agent**—Apparent Authority. —A principal is bound by the apparent, as well as by the actual or express, authority given its general agent, where third persons have in good faith acted and relied thereon.—Southwestern Surety Ins. Co. v. Marlow, Okla., 190 Pac. 672.

73.——Scope of Agency.—An agent authorized to rent property for a year and to find a purchaser and submit bids to his principal does not have the implied power to give an option of purchasing the property for a fixed price.—Clark v. Peoples Bank of Somerset County, Md., 110 Atl. 518.

74. **Principal and Surety** — Imputed Knowledge.—Surety on a contractor's bond is charged with knowledge of all the terms, stipulations, and legal consequences of the contract upon which it became a guarantor.—O'Neil Engineering Co. v. First Nat. Bank of Paris, Texas, 222 S. W. 1091.

75. **Quo Warranto**—Maintenance of Action.— A private person cannot maintain quo warranto except under the authority conferred by Gen. Code, § 12307, permitting a person claiming to be entitled to a public office unlawfully held and exercised by another to bring an action therefor by himself or attorney.—State v. Miami Conservatory Dist. Co., Ohio, 128 N. E. 87.

76. **Reformation of Instruments** — Intent.— Where vendors' agent in pointing out land to purchaser, designated a particular tract as a part of the land to be sold, and where such tract was included in the land described by the contract for sale, the deed will be reformed so as to include such tract as a part of the land conveyed; such having been the intention of the parties.—Cooper v. McLaughlin, S. C., 103 S. E. 523.

77. **Release**—Joint Tort-feasors.—An unqualified discharge of one of several joint tort-feasors is a discharge of all.—Miller v. Perlroth, Conn., 110 Atl. 535.

78. **Sales**—Act of God.—Where defendant is prevented from performing his contract to deliver specific hay by storms and unusual rains, constituting an act of God, he is not liable for nonperformance.—Matousek v. Galligan, Neb., 178 N. W. 510.

79.——Divisibility of Contract.—A contract to supply a railroad company with oil and two supplemental agreements held not to be a divisible contract to furnish oil on the one hand for storage and on the other for current use; divisibility depending not alone upon the multiplicity or separability of items, but upon the parties' intention and the contract's object.—Stern v. Sunset Road Oil Co., Cal., 190 Pac. 651.

80.——Passing of Title.—Whether title to personal property passes through a sale thereof at the time of its delivery depends upon the intention of the parties as shown by all the facts and circumstances of the case.—South San Francisco Packing & Provision Co. v. Jacobsen, Cal., 190 Pac. 628.

81.——Rescission.—A purchaser of an engine must exercise his option to rescind with promptness on the discovery of a defect which constitutes a breach of warranty.—Fox v. Boldt, Wis., 178 N. W. 467.

82. **Specific Performance** — Vendor and Purchaser.—Where, after contract for sale of store premises, but before time fixed for performance, retaining wall on rear, without fault of seller, collapsed on account of erosion, and fell onto and across a yard against rear of building, causing greater part of rear wall to collapse, and breaking windows in front, the loss falls on the vendor, and the buyer cannot be compelled to take conveyance and pay, but is entitled to cancellation, and to recover back the consideration already paid on the contract.—Libman v. Levenson, Mass., 128 N. E. 13.

83. **Statutes**—Adoption from Other State.—A state, in adopting a statute of another state, adopts the construction given it by the courts of the other state.—State ex rel Crow v. Carothers, Mo., 222 S. W. 1043.

84. **Street Railroads**—Negligence per se.—An ordinance giving fire department right of way places on other users of the streets, including street railways, a duty to yield the same for the passage of fire apparatus, and violation of that duty is negligence per se.—Indianapolis Traction and Terminal Co. v. Howard, Ind., 128 N. E. 35.

85. **Taxation**—Situs. — The taxable situs of tangible personal property, not permanently, nor continuously, nor habitually, but only temporarily, in the state, is the domicile of the owner. —Commonwealth v. Clyde S. S. Co., Pa., 110 Atl. 532.

86. **Trade-marks and Trade-names**—Initials as Name.—Defendants Rubenstein have not a legal right to use the letters "R. B." on the footing that it is their name because an abbreviation for "Rubenstein Bros."; initials alone not constituting a name.—W. B. Mfg. Co. v. Rubenstein, Mass., 128 N. E. 21.

87. **Wills**—Attestation.—Where two subscribing witnesses have seen a testatrix subscribe her name to a will by directing another to sign her name thereto in her presence, the testatrix attaching her mark thereto, and the signature so made is then attested and subscribed by said witnesses in the testatrix's presence, the will is properly executed. In such case it is not necessary that the testatrix declare that the instrument is her will or that she has signed it. Keyl et al. v. Feuchter et al., 56 Ohio St. 424, 47 N. E. 140, distinguished.—Underwood v. Rutan, Ohio, 128 N. E. 78.

88.——Domicile of Testator.—It will be presumed that testamentary dispositions of property were made with reference to the law of the testator's domicile, and his intentions should be ascertained in the light thereof.—Jones v. Park, Mo., 222 S. W. 1018.

89.——Supplying Defects.—If the whole will produces conviction that testator must have intended an interest to be given not expressly bequeathed, the court must supply the defect in the will by implication; but such intent must appear from the will, and not merely be founded on construction based on silence, conjecture, or the relationship of the parties.—Bailey v. Bailey, Mass., 128 N. E. 29.

90. **Witnesses**—Cross-Examination. — While the permissible range of cross-examination is to some extent within the discretion of the trial court, it must be confined to matters covered by the examination in chief.—Graves v. Interstate Power Co., Iowa, 178 N. W. 376.